

Vickers



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: BTS Broadcast Television Systems, Inc.--
Reconsideration
File: B-239630.2
Date: September 19, 1990

Jack W. Reed, Esq., Larsen & Stewart, for the protester.
Kevin E. O'Brien, Esq., Office of the Chief Attorney,
Department of the Army, for the agency.
James Vickers, Esq., and John Brosnan, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. While new information indicates that protest dismissed as untimely was in fact timely, the protest is nevertheless academic where agency has taken corrective action.
2. Protester is not entitled to proposal preparation costs and costs of filing and pursuing protest, including attorney fees, where protest was rendered academic by agency taking corrective action and thus no decision on the merits has been issued.

DECISION

BTS Broadcast Television Systems, Inc. requests reconsideration of our decision, BTS Broadcast Television Sys., B-239630, May 25, 1990, 90-1 CPD ¶ 503, dismissing as untimely its protest of the award of a subcontract for a video distribution switch to Utah Scientific by Gramtech, Ltd. BTS contends its protest was timely filed and since the subcontract with Utah Scientific was subsequently terminated as the result of its protest BTS requests its proposal preparation costs and costs of pursuing the protest.

We agree with BTS that its initial protest was timely but since the agency has taken corrective action, we dismiss the protest as academic. For the same reason, we deny BTS' request for costs.

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Contract No. MDA903-85-D-0014, was awarded to Grammtch for automatic data processing equipment hardware, software and maintenance. Grammtch, allegedly acting as purchasing agent for the government, awarded a subcontract for the video distribution switch to Utah Scientific.

BTS protested to our Office on May 10, 1990, arguing among other things that an oral solicitation by Grammtch was never followed by written specifications and evaluation factors.

According to the record that was before us at the time of our May 25 dismissal, BTS was advised of the selection of Utah by letter dated March 26, and the protester responded to Grammtch by letter of the same date announcing an intention to protest. We found BTS' March 26 letter did not constitute a protest because it merely stated an intention to protest and did not contain any specific grounds. Therefore, we concluded that the May 10 protest to our Office was filed more than 10 working days after BTS knew its basis of protest (the selection of Utah Scientific) and was untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990).

Our Office has now been advised by both BTS and the agency, Defense Supply Service--Washington, that subsequent to the protester's March 26 letter Grammtch requested and considered additional pricing and performance information from BTS and actually made award to Utah Scientific on May 1. Based on this information, we conclude that BTS' protest of May 10 to our Office was timely filed. Nevertheless, since as detailed below the agency has taken corrective action, we dismiss the protest as academic.

By letter dated May 30, received by our Office subsequent to our May 25 dismissal, the agency advised us that it had determined that Grammtch's award to Utah Scientific was outside the scope of Grammtch's prime contract and that the video distribution switch would be obtained directly by the agency through a competitive procurement. We believe this renders the protest academic and that it therefore should be dismissed. DHD, Inc.--Recon., Claim for Protest Costs, B-237048.3, Feb. 27, 1990, 90-1 CPD ¶ 237.

Nevertheless, BTS argues that by deciding to compete the procurement, the agency has conceded that the original subcontract award was defective, thereby entitling BTS to its proposal preparation costs and the costs of pursuing the protest.

We find no basis for BTS' claim for protest and proposal preparation costs. Under our current rules, a protester is not entitled to reimbursement of its costs where the protest is dismissed as academic and we therefore do not issue a decision on the merits.^{1/} See Maytag Aircraft Corp.--Recon., Claim for Protest Costs, B-237068.2, Nov. 13, 1989, 89-2 CPD ¶ 457.

The protest is dismissed and the claim for costs denied.


James F. Hinchman
General Counsel

^{1/} BTS cites a General Services Administration Board of Contract Appeals decision, Severn Co., Inc., and Recognition Equip., Inc., GSBICA Nos. 9344-P, 9363-P, 88-2 BCA ¶ 20,566 (1989), for the proposition that a protest should not be dismissed as moot based on an agency's promise of corrective action but that the matter should be decided on its merits. We do not follow the practice of the Board in such matters. See Teknion, Inc.--Claim for Protest Costs, 67 Comp. Gen. 607 (1988), 88-2 CPD ¶ 213.